PRITAM KAUR SIDHU

v.

ROBERT FRANCIS & ORS

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[CIVIL SUIT NO: 22-58-1997]
30 AUGUST 2004

LAND LAW: *Caveat - Private caveat - Application to extend - Whether ex parte extension of caveat necessary - Whether plaintiff disclosed a caveatable interest - Whether there was a serious question to be tried - Balance of convenience - Whether plaintiff entitled to enter caveat over whole land*

This was an application by the plaintiff for an order that a private caveat entered by the plaintiff on the defendant's land be extended for a period of six years pending the trial of the suit herein. This court had granted an *ex parte* extension of the caveat pending the *inter partes* hearing of this application. The defendants, purchasers of the land, had sold undivided lots in the land to sub-purchasers, one of whom was the plaintiff who in 1973 purchased 8000 square feet therein. The defendants completed the purchase of the land in 1980 but had yet to register themselves as the owners of the land, which was still in the name of the original vendor. In 1995, the defendants entered into an agreement to sell the land, including the plaintiff's undivided lot, to one Wong Yik Sing. The main issue requiring determination was whether caveat over the land ought to be sustained in order to preserve and maintain the *status quo* pending the trial of the suit herein.

Held (allowing the application):

[1] In light of the caveat entered by the plaintiff on 20 August 1997 which would have expired on 19 August 2003, pending the disposal of the suit herein and as a matter of extreme urgency, the *ex parte* extension was necessary in order that the *status quo* may be maintained, so that the integrity of the land that was the subject matter of the suit would remain intact. (pp 212 h & 213 a)

[2] Reverting to the facts of this case, which was substantially uncontroverted, there could be no doubt that the caveator had passed through the first stage under s. 323(1)(a) of the National Land Code in that she was the person claiming title to, or a registrable interest in, or any right to such title or interest in the undivided lot, by virtue of the payment by her of 10% of the purchase price for the undivided lot. (p 215 g)

[2a] Further, whether or not the agreement was specifically enforceable in order to entitle the plaintiff to the equitable remedy of specific performance was indeed a serious *bona fide* question to be tried, and it could only be resolved at the conclusion of the hearing of the suit herein by way of mature consideration of *viva voce* evidence after cross-examination and re-examination of witnesses. (p 216 a-b)

[2b] The subject matter of the suit herein was a piece of land which the defendant had, by entering into the sale and purchase agreement with the said Wong Yik Sing, intended to dispose of, in which case the land would be rendered *res extincta*, thereby frustrating the plaintiff's claim in the suit herein. This was clearly contrary to all established principles of law and equity; hence, the balance of convenience or justice was clearly in favour of the caveator so as to allow the caveat to remain in the register pending the disposal of the suit herein. (p 216 c)

[3] Although the caveator was a purchaser of the undivided lot only and claiming an interest in an undivided part thereof, the caveator was entitled to protect that interest by entering a caveat over the whole land provided that the caveat was expressly limited to protecting only that claim, which was the case here. (p 216 e)

Case(s) referred to:

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(foll)***

Damodaran v. Vasudeva [1974] 1 MLJ 128 ***(dist)***

Eng Mee Yong & Ors v. V Letchumanan [1979] 2 MLJ 212 ***(foll)***

Teo Ai Choo v. Leong Sze Hian [1982] 2 MLJ 25 ***(refd)***

Thevathason v. Kwong Joon [1990] 2 CLJ 308; [1990] 3 CLJ (Rep) 248 HC ***(refd)***

Kasivisvanathan Chettiar v. Pereira [1976] 2 MLJ 110 ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 2 CLJ 713 CA ***(foll)***

Macon Engineers Sdn Bhd v. Goh Hooi Yin [1996] 2 MLJ 53 ***(refd)***

Malite Sdn Bhd v. Abdul Karim Gendut [1981] 2 MLJ 2 ***(refd)***

Medan Juta Sdn Bhd v. Tsoi Ping Kwan [1996] 1 MLJ 864 ***(refd)***

Montreal Trust Co v. Churchill Forest Industries (Manitoba) Ltd [1971] 4 WWR 542 ***(refd)***

Muniandy Thamba Kaundan & Anor v. Development Commercial Bank Bhd & Anor [1996] 2 CLJ 586 FC ***(dist)***

Murugappa Chettiar Lakshmanan v. Lee Teck Mbok [1995] 1 CLJ 545 CA ***(foll)***

Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***

Pembangunan Wang Kita Sdn Bhd v. Fry-Fry Marketing Services Sdn Bhd [1998] 2 CLJ Supp 96 ***(refd)***
Ramalingam Rasaratnam v. Sellam Nadarajan [2004] 5 CLJ 484 HC ***(refd)***
Taylor v. A-G [1975] 2 NZLR 675 ***(refd)***
The Venus Destiny [1980] 1 All ER 718 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 25(2)
National Land Code, ss. 323(1)(a), 328(1), 329(2)
Rules of the High Court 1980, O. 92 r. 4

Other source(s) referred to:
David SY Wong, *Tenure and Land Dealings in the Malay States*, p 442
Halsbury's Laws of England, 4th edn, vol 37, para 14, pp 22, 23
Jacob, The Inherent Jurisdiction of the Court (1970) 23 Current Legal Problems, pp. 23, 27, 28

For the plaintiff - Atma Singh Veriah; M/s Atma Singh Veriah & Co
For the defendants - SK Lingam; M/s SK Lingam & Co

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Application

This is the plaintiff's application in encl. (83) for an order that the private caveat *vide* presentation No. 2331-97 Jilid 249 Folio 82 ("the caveat") entered by the plaintiff on 20 August 1997 on the defendants' land held under HS(D) 11516, Lot No. PT 5/715 in the mukim of Seremban ("the land") be extended for a period of six years from 19 August 2003 pending the trial of the suit herein. On 15 August 2003, I granted an *ex parte* extension of the caveat pending the *inter partes* hearing of encl. (83).

Factual Background

On 3 March 1973, the defendants *vide* a sale and purchase agreement purchased the land from one Chooi Tai Fun at a consideration of RM45,000 ("the purchase price").

After paying 10% of the purchase price, the defendants sold undivided lots in the land to sub-purchasers, one of whom was the plaintiff who in June 1973 purchased 8000 sq. ft. therein ("the undivided lot"). The defendants represented to the plaintiff that they would develop the land into a housing scheme. The defendants had utilized the monies obtained from the sub-purchasers to complete the purchase of the land about seven years later, in February 1980.

The defendants have yet to register themselves as the owners of the land which is still in the name of the said Chooi Tai Fun, the original vendor.

On 30 August 1995, the defendants entered into an agreement to sell the land including the plaintiff's said undivided lot to one Wong Yik Sing for RM380,000.

Objection By Defendants

Defendants through learned counsel Mr. SK Lingam objected to the extension of the caveat as he said both the Rules of the High Court 1980 and the National Land Code 1965 do not provide for an *ex parte* application to obtain an extension of the caveat. Relying on *Muniandy a/l Thamba Kaundan & Anor. v. Development Commercial Bank Berhad & Anor.* [1996] 2 CLJ 586 FC; and *Damodaran v. Vasudeva* [1974] 1 MLJ 128 HC, he submitted that the *ex parte* extension given by the court on 15 August 2003 should be set aside and the caveat removed as he is of the view that *Thevathason v. Kwong Joon* [1990] 2 CLJ 308; [1990] 3 CLJ (Rep) 248 HC is not relevant to the instant case.

Unless otherwise sated, any reference to an order and a rule hereinafter is a reference to that order and rule in the Rules of the High Court 1980, and a reference to a section is a reference to that section in the National Land Code 1965.

Defendants' counsel recounted the plaintiff's entry of the caveats on the land as follows:

	Entry of caveat	Lapse of caveat
(1)	23 April 1982	22 April 1988
(2)	30 November 1988	29 November 1994
(3)	1 December 1993	30 November 1999
(4)	20 August 1997 (the caveat)	19 August 2003 but an *ex parte* extension was given on 15 August 2003

He submitted that there was an. overlapping of caveats entered by the plaintiff, as a result of which the plaintiff could not rely on the inherent jurisdiction of the court under O. 92 r. 4.

Another stand taken for the defendants is that the doctrine of *res judicata* does not apply as the earlier litigation was for the removal of earlier caveats and not the caveat.

The defendants referred to *Teo Ai Choo v. Leong Sze Hian* [1982] 2 MLJ 25 and contended that the plaintiff was guilty of laches in enforcing an equitable right, as the plaintiff bought the land in 1973, entered the first caveat in April 1982 and filed this writ in 1997, after 24 years.

Finally, it was submitted that 50 out of 58 "shareholders" of the land had wanted to sell the land and so specific performance should not be granted as the court should not supervise an impossible task.

Plaintiff's Response

Mr. Atma Singh Veriah, learned counsel for the plaintiff, argued that the caveat is intended to preserve and maintain the *status quo* pending the trial of the suit herein, as there are serious questions to be tried and the balance of convenience lies in favour of the plaintiff.

He added that under O. 92 r. 4 the court has an inherent jurisdiction to extend the caveat, seeking support from *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC; *Halsbury's Laws of England*, 4th edn. vol. 37 p. 22 para 14; para 6 in the Schedule to the Courts of Judicature Act 1964; *Tenure and Land Dealings in the Malay States* by David SY Wong p. 442; *Land Law in Malaysia, Cases and Commentary*, 2nd edn. by Teo Keang Sood and Khaw Lake Tee; and *Thevathason, supra*.

It was contended that the caveat which was entered to protect the plaintiff's caveatable interest in the undivided lot is valid on the basis of *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285 FC.

On the question of delay, the plaintiff explained that this action was filed in 1997 when she was informed of the defendants' execution of the sale and purchase agreement on 30 August 1995 to sell the land to one Wong Yik Sing and that the issue of specific performance is to be decided at the trial.

Decision Of The Court

1. The Ex Parte Extension

In the light of the caveat entered by the plaintiff on 20 August 1997 which would have expired on 19 August 2003, I am of the view that pending the disposal of the suit herein and as a matter of extreme urgency, the *ex parte* extension is necessary in order that the *status quo* may be maintained, so that the integrity of the land which is the subject matter of the suit will remain

intact. Upon granting the *ex parte* extension on 15 August 2004, I directed that the same enclosure be heard *inter partes*. The reasons for the *ex parte* extension now follow.

For the removal of doubts, O. 92 r. 4 declares that nothing in the rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

Such inherent jurisdiction of the court includes all the powers that are necessary "to fulfil itself as a Court of Law"; "to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner": *Jacob, The Inherent Jurisdiction of the Court* (1970) 23 Current Legal Problems, 23, 27 and 28, as applied by Edgar Joseph Jr J (later FCJ) in *Pacific Centre Sdn Bhd, supra,* at 147 rt B to C.

This is a virile and viable doctrine being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them: *Halsbury's Laws of England,* 4th edn., vol. 37 para 14, p. 23; *Montreal Trust Co v. Churchill Forest Industries (Manitoba) Ltd* [1971] 4 WWR 542 at 548; 21 DLR (3d) 75 at 81 (Man. CA) per Freedman CJM; *Taylor v. A-G* [1975] 2 NZLR 675 (NZ CA); *The Venus Destiny* [1980] 1 All ER 718.

Further, s. 25(2) of the Courts of Judicature Act 1964 has conferred upon our High Courts additional powers which are set out in the Schedule thereto, the relevant paragraph being contained in para 6 thereof which provides for the interim preservation of property, the subject matter of any cause or matter by sale or the registration of a caveat, or in any manner whatsoever. In my view, para. 6 is sufficiently wide to bring within its ambit and purview the granting of extension of a private caveat on an *ex parte* basis where the matter is of extreme urgency, as in the instant case.

Under s. 328(1) a private caveat enjoys a lifespan of six years from the time it took effect, unless sooner withdrawn or removed. However, upon the lapse of a private caveat after six years, the right to enter a fresh caveat is still available to the caveator even where the fresh caveat is based on the same ground as that on which the earlier one was based if it is for the *bona fide* purpose of protecting the caveator's interest in respect of the same land. The entry of the fresh caveat is not prohibited by s. 329(2): per LC Vohrah in *Thevathason, supra*; (see also Teo Keang Sood & Khaw Lake Tee, *Land Law in Malaysia, Cases and Commentary,* 2nd edn., p. 457).

There is no provision which disallows a fresh caveat to be lodged after the automatic lapsing of a caveat for the protection of the same claim: David SY Wong, *Tenure and Land Dealings in the Malay States* [1975] Singapore University Press p. 442.

In *Damodaran, supra*, the question was whether it was proper for two private caveats to be issued at the instance of the same applicant on the same land and on precisely the same grounds under the National Land Code 1965. It is to be noted that on 20 August 1973, the respondent there entered the first private caveat. Before the removal of the first caveat, the respondent entered a second caveat on precisely the same ground and over the same land. Syed Agil Barakbah J (later SCJ) answered the question in the negative.

The facts in *Damodaran* are clearly distinguishable as there were two concurrent private caveats at the material time, while in the instant case the third private caveat has lapsed on 30 November 1999 when I granted an *ex parte* extension to the fourth caveat ie, the caveat on 15 August 2003. That being the case, the *dictum* in *Damodaran, supra,* is of no assistance to the defendants herein.

In *Muniandy, supra*, the issues before the Federal Court arose out of a charge action to obtain an order for sale and has nothing to do with removal of private caveats.

2. Should The Caveat Be Sustained?

The Privy Council in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212, through the judgment of Lord Diplock, and the Court of Appeal in two landmark decisions of Gopal Sri Ram JCA in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 2 CLJ 713 and *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 CLJ 545 have set out with unrivalled clarity the principles governing the caveator's ability to sustain a private caveat, in three stages as follows:

1. whether he has disclosed a caveatable interest in his application under s. 323(1);

2. if he has established a caveatable interest, then, whether the evidence produced in support of his claim discloses a serious question to be tried; and

3. if both questions are resolved in the caveator's favour, then whether the balance of convenience or justice, lies in favour of the caveat remaining in the register pending the disposal of his suit.

See also *Medan Juta Sdn Bhd v. Tsoi Ping Kwan* [1996] 1 MLJ 864; *Pembangunan Wang Kita Sdn Bhd v. Fry-Fry Marketing Services Sdn Bhd* [1998] 2 CLJ Supp 96, 104; and *Ramalingam Rasaratnam v. Sellam Nadarajan* [2004] 5 CLJ 484 HC.

Section 323(1)(a) provides for the "persons or bodies at whose instance a private caveat may be entered, eg, any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest".

From the wording of s. 323(1)(a), it is my considered view that one of the following persons or bodies may enter a private caveat, *viz*:

(i) any person or body claiming title to any alienated land;

(ii) any person or body claiming any registrable interest in any alienated land;

(iii) any person or body claiming any right to such a title ie, title to any alienated land; or

(iv) any person or body claiming any right to such interest ie, registrable interest in any alienated land.

So long as there exists a valid agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement: *Macon Engineers Sdn Bhd v. Goh Hooi Yin* [1996] 2 MLJ 53, 54 and 55.

In cases in which the removal of a private caveat is called into question, the subject matter to be protected is land. So where the caveat was entered by a purchaser pursuant to a sale and purchase of land, the caveat was allowed to remain: *Kasivisvanathan Chettiar v. Pereira* [1976] 2 MLJ 110 FC, and *Malite Sdn Bhd v. Abdul Karim bin Gendut* [1981] 2 MLJ 29 FC.

Reverting to the above factual background, which was substantially uncontroverted, there can be no doubt that the caveator has passed through the first stage under s. 323(1)(a) in that he is the person claiming title to or a registrable interest in or any right to such title or interest in the undivided lot, by virtue of the payment by him of 10% of the purchase price for the undivided lot.

That being the case, I shall proceed to consider whether the plaintiff has shown that on the affidavits filed, her claim raises a serious question to be tried. This would depend on whether the agreement is specifically enforceable in order to entitle the plaintiff to the equitable remedy of specific performance. This is indeed a serious *bona fide* question to be tried and it can only be resolved at the conclusion of the hearing of the suit herein by way of mature consideration of *viva voce* evidence after cross-examination and re-examination of witnesses.

Having crossed the two hurdles, the caveator must further overcome the third requirement. The subject matter of the suit herein is a piece of land which the defendant had, by entering into the sale and purchase agreement with the said Wong Yik Sing, intended to dispose of, in which case the land would be rendered *res extincta*, thereby frustrating the plaintiff's claim in the suit herein. This is clearly contrary to all established principles of law and equity. The balance of convenience or justice is clearly in favour of the caveator so as to allow the caveat to remain in the register pending the disposal of the suit herein.

In the circumstances, I hold that the caveator has satisfied all the aforesaid stages and that the caveat should be sustained.

3. Caveat Over The Whole Land

Although the caveator is a purchaser of the undivided lot only and claiming an interest in an undivided part thereof, I am of the view that the caveator is entitled to protect that interest by entering a caveat over the whole land provided that the caveat is expressly limited to protect only that claim which is the case here. This proposition of law has been authoritatively stated by the Federal Court through the judgment of Edgar Joseph Jr FCJ in *Chor Phaik Har v. Farlim Properties Sdn Bhd, supra.*

4. Conclusion

For reasons stated above, I am unable to uphold the objection raised for the defendants.

In the circumstances, I allow the plaintiff's application in terms of encl. (83).